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HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953.

No. 163

RAILWAY EXPRESS AGENCY, INCORPORATED,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

Appeal from the Supreme Court of Appeals of Virginia

REPLY BRIEF FOR APPELLANT

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I.

Preliminary Statement

With Appellee's Statement of the Case, we are in substantial agreement. Its statement of the Questions Presented, however, is incomplete. Appellant contends as an alternate grounds that even if the tax is assumed to be a property tax, which it does not concede, the gross receipts of Appellant measure *only the value of its right to carry on business wholly in interstate commerce* and the tax is, therefore, a direct burden on interstate commerce regardless of its nature. Virginia has not granted Appellant any franchise and it does not have the power to tax the value of the right to do an exclusively interstate business guaranteed to Ap-

pellant under the Commerce Clause of the Constitution of the United States. The effect of the tax as applied here, regardless of the name by which it is called, is to burden a privilege not extended or granted by the taxing authority and which the taxing authority is powerless to withhold.

Consideration will now be given (1) to the extent to which this Court is bound by Virginia decisions as to the nature and effect—the actual operating incidence—of Section 58-547, and (2) to the Virginia authorities and the decisions of this Court relied upon by Appellee, and a brief discussion of the true burden of the tax in question.

II.

Extent to which Supreme Court Should Examine Virginia Decisions as to Nature and Effect of Section 58-547

The opinions of this Court often contain the statement that it is always free to determine for itself the nature and effect of a state tax (Opening Brief, p. 11-12). Appellee, however, points out that in many of its other opinions the Court has stated that it is bound by the construction given to state statutes by state courts. Certainly, state courts must interpret the language of the statutes of their state and must fix the *scope* of the tax, if that is not entirely clear from the language. *Aero Mayflower Transit Company* v. *Board of R. R. Commissioners*, 332 U. S. 495 (1947), relied upon by Appellee, is a typical example. In that case the Montana court construed a state tax statute to apply only to revenues derived from the taxpayers' operations within the state, although the language of the statute was susceptible of a broader construction. This Court is naturally bound by this interpretation unless it be an obvious evasion for avoiding a contrary ruling under Federal law. But when the *scope*

of the tax has been found by the state court this Court must consider for itself (a) whether there has been a palpable evasion of its real meaning and (b) whether the tax is in fact a tax on interstate commerce. That is what Appellant is asking this Court to do.

III.

Virginia Decisions

Appellee contends that *City of Richmond* v. *Commonwealth,* 188 Va. 600, 50 S. E. 2d 654 (1948), represents a determination in 1948 that a gross receipts tax on the franchise of a public utility is a property tax on the going concern value increment of the physical properties of the taxpayer, "before the *Spector* case* had been heard of in Virginia." The sole inquiry in the *City of Richmond* case was whether the City could require that the real estate and tangible properties of the public utility be taxed at 100% of its actual value as other properties were alleged to be taxed by that City. The Court held simply that the real estate and tangible personal property of public utilities were classified for taxation separately from the property of other taxpayers assessed locally, that local assessment ratios did not govern, and that the State Corporation Commission was justified in assessing on a basis of state-wide uniform equalization. *There was no issue before the court as to the subject, the nature or the effect of the gross receipts tax on public utilities to say nothing of the gross receipts tax on express companies.*

By way of describing the general scheme of taxation of public service corporations in Virginia, the Court, in passing, referred to the "franchise tax" on public utilities measured

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* *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602 (1951).

by gross receipts and pointed out that it was for the support of the state government and therefore the assessment of tangible properties for taxation *by the localities* must exclude any franchise value. Since this is the most that may fairly be attributed to the *City of Richmond* case, the Attorney General was plainly in error in asserting that in that case the Virginia Court decided that the franchise tax on public utilities, or any similar tax, was a *property* rather than a *privilege* tax. Appellant contends that a franchise tax measured by gross receipts is necessarily a tax on the *privilege* of exercising that franchise and not on the going concern or "franchise value" which the exercise of that privilege generates only when the enterprise is profitable.

Although the final decision was not rendered until 1951, most well-informed lawyers were well aware of the *Spector* case and its possible implications long prior to 1948, because of its history in the District Court, the Court of Appeals and this Court, dating back to 1942. Counsel for Appellee therefore speak only for themselves when they state that the *Spector* case had not been heard of in Virginia when the *City of Richmond* case was decided in 1948.

Appellant relies on *Virginia Electric and Power Company* v. *Commonwealth*, 174 Va. 316, 6 S. E. 680 (1940), to show that the Virginia Court has expressly stated that a *similar* gross receipts tax on electric railroads is a tax on the "power or right of franchise" of such companies as distinguished from a tax on the property used to produce those gross receipts. The unequivocal language of the Virginia Court in this case is a most positive expression of what it conceives to be the nature of a franchise tax measured by gross receipts.

Appellee refers to the statement of the Corporation Commission that its assessment of the real estate and tangible

properties of public service corporations does not include the intangible elements of value which may be attributable thereto, and that the "franchise value" of those companies is assessed at 100%. Reliance is also made upon the reference, in the debates in the Constitutional Convention of 1902, to the franchise of public service corporations as a separate object of taxations. The reference to "franchise value" by the Commission and in the constitutional debates were made with respect to Virginia public service corporations *operating under franchises granted by the Commonwealth.* The Virginia Constitution provides that *only* Virginia corporations may operate intrastate as public service corporations* in Virginia and such corporations are required to obtain operating franchises from the Commonwealth. But Virginia has refused Appellant a franchise to do an intrastate express business (See Opening Brief, p. 3) and does not have the power to tax the value of its right to do an exclusively interstate business guaranteed to it under the Commerce Clause of the Constitution.

The *general* statements of the individual members of the Constitutional Convention quoted by Appellee (Brief, p. 18, 19) must give way to the specific statement in the debates (referred to in Appellant's Opening Brief, p. 24) of the fact that the gross receipts tax on railroads, which furnishes the general pattern followed by other gross receipts taxes of public service corporations in Virginia, was patterned after the Maine statute as construed in *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217 (1891). In that case the tax had been construed by this Court to be an *excise* or privilege tax eleven years before the Virginia Constitutional Convention of 1902. This is the best evidence of the intention of the framers of the Constitution of Virginia with respect to the *nature* of such a tax.

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* Constitution of Virginia, § 163.

IV.

Decisions of this Court

Since the Virginia system of gross receipts taxes was admittedly patterned after the tax considered by this Court in *Maine* v. *Grand Trunk Railway Co., supra,* Appellee has seized on the speculative reference in *Galveston, Harrisburg & San Antonio Railway Co.* v. *Texas,* 210 U. S. 217 (1908), that the Maine tax "may be said to have been made a measure of the value of the property per mile" (p. 226) and urges this to prove that such a tax was a property tax. In the majority opinion in *Interstate Oil Pipe Line Co.* v. *Stone,* 337 U. S. 662 (1948), this Court made it clear that the above-quoted statement from the *Galveston* case was in error. The Court stated:

> "That case [referring to Maine v. Grand Trunk Railway Co.] sustained a state statute which imposed upon an interstate railroad corporation 'an annual excise tax (and measured by apportioned gross receipts), for the privilege of exercising its franchises in this state.'" (p. 667)

The above statement contains the following footnote explanation:

> "Nothing in the *Grand Trunk* opinion suggests the explanation hazarded by Mr. Justice Holmes in *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 226, that the tax in the *Grand Trunk* case was sustained on the ground that it was imposed in lieu of ad valorem taxes."

In the dissenting opinion in *Interstate Oil Pipe Line Co.,* Mr. Justice Reed pointed out that *Grand Trunk,* "concerning a tax on the privilege of exercising a franchise in Maine," could only be reconciled with later cases of this

Court if Grand Trunk *did an intrastate as well as an interstate business* (p. 681). After stating that "a state franchise tax for that is permissible," the dissenting opinion emphasizes that Grand Trunk was not "a precedent for the tax on the privilege of doing an interstate business" (p. 681).

In its consideration of this case it is of the utmost importance that the Court always keep in mind, that the Constitution of Virginia, prohibiting *foreign* public service corporation from doing a public service business in Virginia, gave rise to this unique case and at the same time makes inapplicable as precedents *all* the cases cited and relied upon by Appellee, for in each the taxpayer was engaged, at least to some extent, in intrastate commerce.

Appellee lays considerable stress upon *Western Livestock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), from which it quotes at length (Brief, p. 7, 8). That case involved a tax, "in form and substance, an excise conditioned on the carrying on of a *local* business" distinct from interstate commerce. Such a tax could not be levied by Appellee here because Appellant is not engaged in local business operations in Virginia. As the dissenting opinion in *Interstate Oil Pipe Line Co., supra*, pointed out, this is enough to distinguish *Maine* v. *Grand Trunk*. It is also sufficient to distinguish *all* the other cases involving privilege or franchise taxes cited in the quotation from *Western Livestock* case by Appellee (Brief, p. 7, 8) as well as *Interstate Oil Pipe Line Company*. In that case the deciding vote for the validity of the tax was by Mr. Justice Burton who concurred in the result solely because he considered the tax to be on intrastate or local activity.

Even if, contrary to our belief, the tax here in question, properly construed, can be said to be a property tax, this Court has never approved such a tax except where some

intrastate or local activity was involved. In *U. S. Express Co.* v. *Minnesota*, 223 U. S. 235 (1912), the tax, measured by gross receipts partly from interstate and partly from intrastate commerce, was "in lieu of all taxes upon" the property of the taxpayer. The Court stated:

> "The statute was not aimed exclusively at the avails of interstate commerce * * * but, as in the *Maine Case*, was an attempt to measure the amount of the tax within the admitted power of the state by income derived, in part, from the conduct of interstate business." (p. 347)

See *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450 (1918), where a similar gross receipts tax was held to be a property tax and sustained because a portion of the gross receipts were derived from intrastate commerce.

Appellee contends that *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80 (1947), supports the tax in this case. There, in addition to *ad valorem* taxes, Mississippi imposed "a franchise or excise tax" based on the value of the capital used, invested or employed within the state. The levy was sustained on the ground that the state court had construed the statute to be a tax imposed not on the privilege of engaging in interstate commerce, but a tax solely upon *"the local activity* of maintaining, keeping in repair and otherwise in manning the facilities" situated in Mississippi. There has never been any suggestion by the Virginia Commission, or the Virginia Court, that the gross receipts tax on express companies *is upon any local activity*, as applied here, for both the Commission and the Court below held that there is not any local activity carried on by Appellant.

Finally, Appellant wishes to correct the misapprehension of Appellee, that the *Spector* case is being relied on as au-

thority for the *nature* and *scope* of the Virginia tax. This is not the case. Appellant relies on the *Spector* case as controlling because the Virginia tax is an *excise* or *privilege* tax in its effect, regardless of the name by which it is called.

V.

Conclusion

It is respectfully submitted that § 58-547 of the Code of Virginia, 1950, as applied to Appellant is in its ultimate effect a direct tax on the privilege of engaging in interstate commerce and as such violates the Commerce Clause of the Constitution of the United States and therefore the judgment of the Supreme Court of Appeals of Virginia should be reversed.

Respectfully submitted,

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